Chapter 4

Application and operation of the Bill

Introduction

4.1 The focus of this chapter is on the second of the two key areas of debate raised during the committee's consultation process, namely, the application and operation of the Bill's requirements that fibre-related infrastructure be installed in specified developments.

Key matters raised

4.2 The key matters raised by submitters concerning the application and operation of the Bill were:

- the scope of the Bill, specifically to what types of developments it will apply, and how it will affect projects for which planning, development and/or construction processes have already commenced;
- the content and implications for fixed-line telecommunications service provision generally of the requirements to deploy fibre and/or install fibre-ready facilities; and
- ownership of the infrastructure, the intended access regime, and integration of the infrastructure with the NBN.

4.3 To some extent, the grounds for discussion shifted between the time at which written submissions were received and the committee's public hearing. The Bill provides that the detail of the application and operation of the Bill's requirements is to be provided for in subordinate legislation. This includes, but is not limited to, the threshold 'triggers' at which developments will be exempted from requirements to deploy fibre, and the stage of development to which the Bill will apply. The committee's deadline for written submissions was 6 April 2010. On Friday, 16 April 2010, a Position Paper outlining the substantive approach expected to be taken in the subordinate legislation was released by the minister for Broadband, Communications and the Digital Economy (the minister) and circulated by the Department.[1] The committee conducted its hearing on the following Monday, 19 April 2010.

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1 Senator the Hon. Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, 'Further detail on superfast broadband for greenfields', 16 April 2010, www.minister.dbcde.gov.au/media/media_releases/2010/035 (accessed 2 May 2010). See also 'Proposed subordinate legislation to give effect to fibre in new developments', *Position Paper*, 16 April 2010, www.dbcde.gov.au/__data/assets/pdf_file/0005/127517/Proposed_subordinate_legislation_to_give_effect_to_fibre_in_new_developments.pdf (accessed 2 May 2010).

4.4 As a result of the timing of these events, at the public hearing, the committee invited witnesses to subsequently submit additional information outlining their response to the Position Paper.

The scope of the Bill's application

The role of subordinate legislation

4.5 The Bill is drafted broadly as framework legislation. It provides that detailed subordinate legislation will provide for the application and operation of Proposed Part 20A.[2] It gives the minister the authority to specify the property developments or classes of developments in which:

- Fixed lines which are installed to building lots and/or units must be optical fibre; and
- fixed-line facilities (e.g. passive infrastructure like conduits and pits) which are installed to building lots and/or units must be fibre-ready facilities.

4.6 For example, the requirement in proposed section 372B(2) that any fixed line deployed to a project area be a fibre line, applies only to projects 'specified in, or ascertained in accordance with, a legislative instrument made by the minister'[3] and where no exemption under a legislative instrument provided for in subsection 372B(4) applies.

4.7 At the time of making written submissions, in the absence of the subordinate legislation, many submitters were concerned that the details of how the Bill would operate in practice were unknown. The Urban Development Institute of Australia, for example, stated that:

> …under the current available legislation, it is uncertain which developments will be required to adhere to the FTTP provision and which are exempt.[4]

4.8 However it was also clear at the committee's hearing that the attitude of most witnesses was that their concern was not that the detail of the requirements be in the primary Act itself, but that it be contained somewhere. The following statement of Master Builders Australia to this effect was representative of the attitude of a number of submitters:

> What we are saying is that we do not mind where the detail lies so long as it is open, transparent and readily communicable to our members... The problem to be solved is getting the detail of those rules that can be implemented and having them in a comprehensive form that we can then

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2 Proposed Part 20A provides the fibre connection requirement and the fibre-ready requirements for new developments. See Chapter 2, above, for a detailed outline of the Bill.

3 Proposed s. 372B(1)(b).

4 Urban Development Institute of Australia, *Submission 15,* p. 8.

> distil and then provide to our members in terms of education. The detail of how that is achieved in the legislative process—it is always better the more it is transparent, open and upfront, but if the process renders clear rules that our members can follow, that is our credible criterion.[5]

4.9 Optus indicated that although its policy preference is that all fibre be deployed (or at least its deployment co-ordinated by) NBN Co, if the Bill is to be the mechanism for servicing new developments, then it is sufficient that the detail be contained in subordinate legislation:

> [T]he broad principle in our submission... is that logically we think it would be preferable for NBN Co. to deploy fibre, and that in many senses would obviate the need for these further detailed rules around deployment of fibre and the characteristics of that particular fibre. However, if [the detailed rules for new developments] is a path that we need to go down then certainly the subordinate instruments are an appropriate place for that information to be set out—but we would need to look at the detail.[6]

4.10 The Department emphasised that in the circumstances of this Bill, extensive use of subordinate legislation to provide the operating detail was in the interests of flexibility and more appropriate targeting of its application:

> The bill makes extensive use of subordinate legislation to have operational effect. The use of subordinate legislation is to ensure requirements can be specified in sufficient detail and to provide flexibility, particularly to allow for the targeting and phasing in of requirements.[7]

The content of the proposed subordinate legislation

4.11 The Position Paper now sets out the substantive approach to be taken in the subordinate legislation.[8] It clarified the geographic application of the Bill, the types of developments to be captured (assessed according to size of development and price of fibre deployment thresholds), the content of exemptions for certain conduct, and the practical date of effect for the Bill to apply to developments already at various stages of development (the trigger event).

4.12 In summary, the approach outlined in the Position Paper is as follows:

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5 Mr Richard Calver, Legal Counsel, Master Builders Australia, *Committee Hansard,* Sydney, 19 April 2010, p. 52.

6 Mr Andrew Sheridan, General Manager, Interconnect and Regulation, Optus, *Committee Hansard,* Sydney, 19 April 2010, p. 15.

7 Mr Daryl Quinlivan, Deputy Secretary, Department of Broadband, Communications and the Digital Economy, *Committee Hansard,* Sydney, 19 April 2010, p. 55.

8 'Proposed subordinate legislation to give effect to fibre in new developments', *Position Paper*, 16 April 2010, www.dbcde.gov.au/__data/assets/pdf_file/0005/127517/Proposed_subordinate_legislation_to_give_effect_to_fibre_in_new_developments.pdf, (the Position Paper).

- *Geographic application of Bill:* the subordinate legislation will seek to target those parts of Australia where services are expected to be provided over a fibre access network, and to provide for the possible expansion of the fibre footprint over time. To this end, it is proposed that the subordinate legislation apply in areas of Australia where an urban utility such as reticulated water, sewerage or mains electricity is installed.[9]
- *Application of fibre-ready requirement:* it is envisaged that any development caught by the geographic coverage criteria would be subject to the fibre-ready requirement. That general rule would be subject to certain exemptions. One exemption envisaged is that the rule would not apply if, at the time of installation, the development was in an area specified in a plan published by NBN Co as being a non-fibre area or where NBN Co otherwise gave an explicit exemption in writing prior to the installation of relevant infrastructure. Consideration is also being given to allowing a party to apply to ACMA to exempt a development, in writing, from the fibre-ready requirement.[10] Further qualification of the rule will apply to in-fill and urban renewal developments so that the fibre-ready requirement would generally be limited to facilities within the property boundary and existing passive infrastructure in the street not otherwise being touched would not need to be replaced.[11]
- *Fibre connection requirement:* the requirement to actually deploy fibre will build on the fibre-ready requirement. It will apply where:
  - (a) the development meets the fibre-ready threshold criteria, and:
  - (b) the development over its life is to be equal to or greater than 200 building lots and/or units (the size threshold); and
  - (c) fibre could be installed at a price of $3,000 or less (including GST), which includes the price of backhaul (the price threshold).[12]

  The Position Paper additionally provides the following clarifications:

  - the number of lots or units refers to the whole of the development;[13]
  - the price figure refers to the price *payable by the party acquiring the fibre facilities*, not to the total cost to the provider of providing the infrastructure and services.[14]

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9 Position Paper, p. 5.

10 Position Paper, p. 5.

11 Position Paper, p. 6.

12 Position Paper, p. 6.

13 Position Paper, p. 6.

14 Position Paper, p. 7.

  - the price figure would cover all relevant equipment and installation for providing FTTP services, including the provision from the network to the property boundary and to the premises of trenches, passive infrastructure, fibre cabling and associated distribution facilities, backhaul capacity, an optical network terminal and cabinet at the premises, and basic internal wiring.[15]

- *Practical date of effect on the ground:* the legislative framework is proposed to commence on 1 July 2010 (proposed clause 2 of the Bill). However, the regulations are to provide that in terms of practical effect on the ground, the fibre and fibre-ready requirements will apply to fixed-line facilities and fixed lines that are to be installed in relation to a development for which a Stage 3 planning application (infrastructure planning) is lodged on or after 1 July 2010. 'Stage 3' is broadly defined as a stage occurring 3¼–8 years prior to premises construction and being one of 'negotiation of infrastructure levies and detailed structure planning' in which 'more detailed site planning, possible determination of developer contributions' occurs, and agencies such as roads, water, electricity, sewer and public transport are involved.[16] Appendix 3 reproduces the Department's table of the 'Six Stage Generic Development Pipeline for Greenfield Development and Major Brownfield Redevelopment' which was used in the Position Paper.

Application and operation of the Bill: views expressed

4.13 The approach taken in the Position Paper had the effect that a number of concerns raised in written submissions about the operation or application of the Bill were not pursued at the hearing. For example, concerns that property developers might be financially disadvantaged by requirements to invest substantial sums deploying expensive optical fibre lines and backhaul infrastructure to project areas, were largely circumvented by the articulation in the Position Paper of the envisaged $3000 price threshold and 200 lot size threshold. Similarly, previously voiced concerns that the requirements to deploy fibre or install fibre-ready facilities would cause significant cost blow-outs for projects substantially commenced and constructed, were to a great degree rendered moot by the Position Paper's proposal that the Bill take practical effect on the ground only to projects lodging a Stage 3 application after 1 July 2010.

4.14 At the public hearing, most witnesses did not comment on the financial implications for project developers whose projects will be subject to either a fibre-ready or fibre-deployment requirement.

4.15 To the extent that opinions were expressed at the hearing on the application and operation of the Bill, the primary matter raised related to the policy of new developments being subject to a requirement to pay for, or contribute at all to, the

15 Position Paper, p. 6.

16 Position Paper, pp 9–10.

installation of fibre-ready facilities or the deployment of fibre lines.[17] This was generally described as the 'inequity' argument and particularly propounded by property developers. The argument was explained by one member of the Urban Development Institute of Australia as follows:

> What we see as the inequity in this from day one is that, in effect, you are capitalising upfront costs for fibre to the premises for a person purchasing and then paying that as a lump sum upfront, because it is built into the cost of the land that they are purchasing, and then you are going to tax them. There is inequity in that that it is important to address.[18]

4.16 Master Builders Australia were also dissatisfied with the application of any fibre deployment or 'fibre-ready' requirement funded in any way through developer contributions, regardless of whether a price cap or size threshold applies:

> As a general rule, we are of the view that the developer should only be responsible for the provision of pit and pipe reticulation for fibre within the development that would allow future fibre installation when the super-fast broadband service is available. All other costs should become the responsibility of the Service Provider and/or Government...
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> The proposed legislation and the Paper are highly likely to adversely affect the commerciality of affordable and low-income housing developments.[19]

4.17 Mr Aaron Gadiel, Chief Executive Officer of the Urban Taskforce Australia, expressed his organisation's attitude to the perceived inequities underlying the Bill and the government's fibre in greenfields policy as follows:

> To some extent the federal government has accepted that there is some inequity in [providing different arrangements for the deployment of fibre infrastructure to new developments compared with those for existing premises] and the proposal now is for the cost to new development projects to be capped at $3,000, I assume per residential lot or unit, although the paper does not make this clear. There is also a restriction saying that the obligation to put optic fibre in, as opposed to fibre ready, would only apply to developments of 200 building lots or units and larger. This does raise a couple of issues. Firstly, there is still an expectation from the federal government that some development projects will carry the cost of backhaul, backhaul being the network infrastructure that is not located on a development site but might be necessary to integrate new homes or business premises effectively into a national broadband network. We appreciate the financial costs of backhaul or head end are to be taken into

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17 For example, Mr Bruce Duyshart, Member, Urban Development Institute of Australia, *Committee Hansard,* Sydney, 19 April 2010, p. 39, Mr Aaron Gadiel, Chief Executive Officer, Urban Taskforce Australia, *Committee Hansard,* Sydney, 19 April 2010, p. 41.

18 Mr Bruce Duyshart, Member, Urban Development Institute of Australia, *Committee Hansard,* Sydney, 19 April 2010, p. 39.

19 Master Builders Australia, answer to question on notice, 19 April 2010 (received 28 April 2010), p. 2.

> account in this $3,000 cap, but we still are of the view that it is inconsistent for new home owners and businesses to be required to make a direct contribution to off-site network infrastructure through their own property's purchase price, whilst existing home owners and businesses do not face these costs, although they are funding it through the taxes that everyone pays.[20]

4.18 Further, Mr Gadiel explained that his organisation dissents from the government's view that a size threshold trigger is appropriate in any case:

> We have never been fond of the suggestion that there should be a size threshold, as such. To us the more relevant consideration should be what is the likely pace of the rollout of an optic fibre network, including head end and so forth, in the community or area concerned. It seems to us illogical that a developer might be compelled to introduce fibre to a 200 dwelling unit development in an infill location in the absence of any clear plan to roll out the connecting network to that unit development in the foreseeable future. It seems to us the obligation should not exist in isolation from clear concrete plans from whatever authorities will be responsible for rolling out this network to existing areas as well as new communities.[21]

4.19 The Department's evidence to the committee indicated that the premise of the inequity arguments (that new developments will have to pay for fibre infrastructure while existing premises will get it free from NBN Co at a later date) may be incorrect. The Department responded to the inequity argument by saying:

> It was noted in the Second Reading Speech that the cost recovery arrangements that may ultimately apply in greenfields will depend on the commercial arrangements that emerge between all relevant parties as fibre-to-the-premises is deployed more widely. How roll-out costs will be recovered in both brownfields and greenfields will depend on a range of factors and it cannot simply be assumed that stakeholders in greenfields will have to meet costs in one way while those in brownfields are expected to meet them in another. In all instances, NBN Co is expected to operate on a commercial basis and to recover its costs.[22]

4.20 In contrast to the submissions made by property developers, carriers appeared to be in broad support for the proposed operation and application of the Bill, subject to their concerns that the price threshold may be too low, and the size threshold too high, to capture sufficient developments with the requirement to deploy fibre. Mr Roger McArthur, General Manager of the Universal Communications Group, explained his

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20 Mr Aaron Gadiel, Chief Executive Officer, Urban Taskforce Australia, *Committee Hansard,* Sydney, 19 April 2010, p. 41.

21 Mr Aaron Gadiel, Chief Executive Officer, Urban Taskforce Australia, *Committee Hansard,* Sydney, 19 April 2010, pp 41–42.

22 Department of Broadband, Communications and the Digital Economy, answer to question on notice, Question 5, 19 April 2010 (received 28 April 2010), Attachment B, Item 1, p. 1.

concern that, as drafted, the Position Paper will see subordinate legislation created that has loopholes enabling developers to side-step fibre connection requirements:

> [T]he bill, it defines a framework, but there is a level of detail. Some of those elements are covered off in the Position Paper—for example, setting the 200 [lots size threshold] and the financial frameworks [of the price threshold] and so on—and that goes a long way to actually providing some degree of certainty. I do feel that in its current form it does provide leverage or capability for developers to sidestep by creating development lots which actually fall below a threshold, so they might have to be forced to meet the fibre-ready requirement but not be forced to build the fibre requirements.[23]

4.21 In light of that concern, Mr McArthur and Mr Ralf Luna, Chief Executive Officer of the Universal Communications Group, put forward a proposal that local governments aggregate FTTH Greenfield developments in local development plans so as to ensure the cost of backhaul could not be used to manipulate the application of the price cap or the size threshold:

> [W]e believe the most likely claim for a development to be exempt under the proposed Bill will be that it is too small to cover the common development costs, and this will push up the cost per lot to an unacceptable level. To avoid developers sidestepping the legislation, we believe consideration should be given to requiring local councils, maybe under the direction of NBN Co., to aggregate fibre to the home greenfield developments in the local development plans. The aggregation of multiple developments in the same geographic area would allow much smaller developments to be added to the fibre to the home plans of existing greenfield developments in the future... [The aggregation element] would prevent individual developers from creating lot sizes which would simply mean that they could avoid admitting the intent of the bill.[24]

4.22 Telstra also submitted that the size threshold will operate as an artificial constraint on the deployment of fibre to new developments:

> Telstra has consistently advocated for a singular monetary cap as the threshold for the fibre requirement. In our view, the 200 lot size threshold is an artificial constraint on the deployment of fibre. There may well be many smaller developments that could be fibred for less than $3000 per lot, especially once the policy and the market dynamics are established.

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23 Mr Roger McArthur, General Manager, Universal Communications Group, *Committee Hansard,* Sydney, 19 April 2010, p. 33.

24 Mr Ralf Luna, Chief Executive Officer, Universal Communications Group, and Mr Roger McArthur, General Manager, Universal Communications Group, *Committee Hansard,* Sydney, 19 April 2010, pp. 29, 33.

> But if the 200 lot threshold is to remain, it should be closely monitored and adjusted downwards as the regulation and the market matures.[25]

4.23 In addition, while broadly supportive of the $3000 price threshold, Telstra raised a number of concerns as to its particular detail. Amongst other concerns and recommendations, Telstra suggested the price cap should be drafted so as not to enable a developer to claim the full value of trenching costs that would be incurred by the developer anyway in order to provide water, sewerage and electricity to the development.[26]

4.24 As to the timing of the Bill's application, a number of views were expressed. Most witnesses agreed that discussions about telecommunications infrastructure occur at around a time corresponding with the 'stage 3' outlined in the Position Paper. Mr Paul Granville of Telstra explained that:

> [g]enerally the negotiations occur before the developers finalise the financing. They need to understand all of their costs reasonably early in the process, so they go out and seek negotiations with various suppliers so that they have clarity about their total costs before they actually go through to get approvals. So it would be quite early on, probably at around stage 3. Those stages do vary from state to state, but it would be roughly in that sort of time frame. It could be several years before they actually turn the first sod.[27]

4.25 Property developers and organisations suggested that there is some fusion between stage 2, 3 and 4 for the purposes of determining when telecommunications infrastructure decisions are made, and that this would complicate the merit of the proposal in the Position Paper as to the timing of the Bill's requirements taking effect:

> The government in its paper on Friday had a very neat table with the six stages of development. That has been reproduced by the National Housing Supply Council. That table rather oversimplifies a process that most developers and planners cannot get their heads around. There is no clear, neat stage 3. The government suggests that all developments that have progressed to the stage 3 point at 1 July would be subject to these new rules. Trying to work out whether a development is at stage 3 is a challenge because stage 3 is not a statutory process. It is a non-statutory process that can be as long or as short as a piece of string, if it exists at all. Sometimes

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25 Telstra Corporation Ltd, answer to question on notice, 19 April 2010, (received 29 April 2010), 'Response to the "Position Paper" dated 16 April 2010 from the Department of Broadband Communications and the Digital Economy on the proposed subordinate legislation to give effect to fibre in new developments', p. 5.

26 Telstra Corporation Ltd, answer to question on notice, 19 April 2010, (received 29 April 2010), 'Response to the "Position Paper" dated 16 April 2010 from the Department of Broadband Communications and the Digital Economy on the proposed subordinate legislation to give effect to fibre in new developments', p. 5.

27 Mr Paul Granville, Director, Network Standards and Facilities, Telstra Corporation Ltd, *Committee Hansard,* Sydney, 19 April 2010, p. 8.

> what is described as stage 3 would actually happen before stage 2 and sometimes what is described as stage 3 would happen after stage 4.[28]

4.26 Telstra was the only organisation to submit that stage 3 may be too early in the development process with the result that there will be 'significant delay in the government's fibre objectives being achieved':

> [U]sing Stage 3 as the trigger point means that there will be a significant 'tail' or real estate developments constructed after 1 July 2010 to which the fibre/fibre-ready requirements do not apply–even though the deployment of fibre in those real estate developments may well be feasible.[29]

Application and operation of the Bill: committee view

4.27 The committee supports the general principle adopted by the Bill and the Position Paper which will create a default fibre-ready requirement applying broadly wherever other utilities services are reticulated, and a more limited fibre-deployment requirement additionally applying where the 200 lots size threshold and $3000 price cap threshold are satisfied.

4.28 The committee also supports the intention that the subordinate legislation will result in the Bill's requirements to deploy optical fibre or install fibre-ready facilities taking practical effect for developments which lodge a Stage 3 application after 1 July 2010. The committee believes that, given Telstra's decision to no longer deploy copper to new developments, if fibre deployment is feasible (logistically and financially) in projects which are not captured by the cut-off date, then property developers may very well enter into commercial arrangements to deploy fibre so as to provide fixed-line infrastructure to end users. The committee does not believe it is necessary to bring forward the cut-off requirement so as to apply to projects which, on 1 July 2010, will be classified as having reached, a later stage.

4.29 The committee believes that the price and size thresholds are appropriately targeted to ensure that, wherever possible, new developments are serviced with fibre technologies and are not left with outdated infrastructure. The committee believes that, in combination, the Bill and the Position Paper represent a reasonable balance between the competing considerations of financial cost to developers, the interests of end users and the community in the provision of modern telecommunications infrastructure to new developments, and government policy, which all need to be taken into account. The committee agrees with the Universal Communications Group

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28 Mr Aaron Gadiel, Chief Executive Officer, Urban Taskforce Australia, *Committee Hansard,* Sydney, 19 April 2010, pp 42–43. See also Mr Robert Appleton, National Director, Technical and Regulatory Policy, Master Builders Australia Ltd, *Committee Hansard,* Sydney, 19 April 2010, pp 51–52.

29 Telstra Corporation Ltd, answer to question on notice, 19 April 2010, (received 29 April 2010), 'Response to the "Position Paper" dated 16 April 2010 from the Department of Broadband Communications and the Digital Economy on the proposed subordinate legislation to give effect to fibre in new developments', p. 7.

that local government could play an important planning role in the aggregation of new developments for the purposes of backhaul costs, but considers that this is a matter for local governments and that, as a first step, the size threshold remains an appropriate mechanism.

4.30 The committee acknowledges that not having the final version of the proposed subordinate legislation prior to undertaking the inquiry to some extent affected the ability of witnesses to evaluate all the relevant material and to articulate their positions to the committee. The committee appreciates the final version of the subordinate legislation has not yet been settled and that the Position Paper is subject to a consultation process.

Content and implications of the fibre / fibre-ready requirements

4.31 As drafted, the Bill does not mandate or compel the provision of fibre lines or fibre-ready facilities to specified developments. Rather, it prohibits a person from installing a fixed line or telecommunications facilities unless it is a fibre line or they are fibre-ready facilities.

4.32 However, in answer to a question taken on notice, the Department indicated that the intention is that the effect of complementary state and territory planning arrangements currently being negotiated will be to require that fixed telecommunications facilities be provided in new developments. The Department explained:

> The particular measures will vary because state and territory planning arrangements vary in their structure, but it is envisaged that there would be a requirement that fixed telecommunications facilities be provided in new developments, and that those facilities meet relevant Commonwealth requirements, thereby interlinking state, territory and Commonwealth arrangements...
>
> In general...it appears that the approach most states and Territories would take is to add fixed telecommunications to the list of utilities which have to be provided for before a planning application is approved.[30]

4.33 It should be noted that some reservations were expressed, for example by Master Builders Australia, concerning the fragmentation of fibre connection and fibre-ready facilities installation standards and regulations into a myriad of different state and local government requirements.[31]

4.34 However, the Department did indicate that proposals to legislatively mandate the deployment of fibre infrastructure at a Commonwealth level had been canvassed but rejected for a number of reasons:

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30 Department of Broadband, Communications and the Digital Economy, answer to question on notice, Question 10, 19 April 2010 (received 28 April 2010).

31 Master Builders Association, *Submission 10,* p. 1.

> [T]he Bill conditions what is to be done rather than directly requiring the installation of such facilities.
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> [The Department] canvassed the possibility of legislating directly to require developers to ensure pit, pipe and FTTP infrastructure and services are available to consumers in its Discussion Paper in May 2009. It found that this could be done using the Commonwealth's corporations power under the Constitution but would be limited to corporations and would have to be enforced by prohibiting the trading of land where the requirement was breached. This was strongly opposed by developers and was considered to be intrusive and disproportionate. Developers also put the view their developments would need to include fixed line infrastructure to be marketable.[32]

4.35 In relation to the issue, it is necessary to bear in mind Telstra's decision to no longer deploy copper to new developments regardless of whether those developments are subject to a legislative prohibition on the installation of non-fibre fixed-line telecommunications infrastructure. A number of submitters, including the Urban Development Institute of Australia, stressed that the decision may have profound effects on the financing, infrastructure deployment arrangements, and end-user satisfaction with new developments.[33] Mr Paul Budde, Managing Director of Paul Budde Communication Pty Ltd, explained his assessment of the implications of Telstra's conduct as follows:

> Perhaps the most disruptive development has been not the Bill itself but the subsequent announcement from Telstra that it will no longer deploy its copper-based infrastructure in greenfield developments.
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> This action, of course, makes the government’s proposition in the legislation to be ‘fibre-ready’ a non-issue. There is no longer an alternative. And this, then, places a large question mark on how the developers will enable the provisioning of a telephone service. In most situations they will simply not get planning approval unless they can prove that such a fibre based service will be made available.
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> At the same time customers will not expect just a telephone connection – they will demand broadband – but, legally at least, nobody will be required to provide such a service since broadband is not a declared telecommunications service.[34]

4.36 Mr Budde went on to elaborate what he believes is likely to happen to fill the vacuum created:

> The reality remains – as it always has been – that Telstra is the only organisation capable of dealing with the smaller sites (1–500 dwellings), as

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32 Department of Broadband, Communications and the Digital Economy, answer to question on notice, Question 2, Attachment A, Item (1), 19 April 2010 (received 28 April 2010).

33 Urban Development Institute of Australia, *Submission 15,* p. 6.

34 Paul Budde Communication Pty Ltd, *Submission 14,* p. 1.

> it is uneconomical to provide site space, backhaul and a FTTH network for these small sites, since the end cost of all this has to be recovered from the sale price of the product (a house or piece of land).
>
> For these small sites a developer would have to rely on a solution that goes back to Telstra's exchange, as this is the only location they can physically connect back to without massive backhaul costs. And so as a result of this policy Telstra, by default, wins that entire segment of the market, which is significant in terms of the overall number of sites.[35]

4.37 However, the committee did receive evidence that there is a competitive market for the supply of fibre services to new developments. In addition to Telstra and the Universal Communications Group, several other companies which currently offer to install fibre for new estates are listed in the EM. They include Arise, Clubcom, OPENetworks, Opticomm, and TransACT.[36]

4.38 It was also pointed out by the Department that although the Bill supports the continued existence of the competitive market for the supply of fibre-related infrastructure, nothing in the legislation would prevent NBN Co from supplying fibre or installing fibre-ready facilities in the future if it chose to do so.[37]

4.39 A number of submitters suggested that they believed it would be preferable that all fibre deployment and installation be managed by NBN Co. One of the most vocal proponents of that proposal was Optus:

> In our submission we have argued that NBN Co. should deploy fibre in greenfield sites. If it were to do so then the cost of that deployment would be taken up as part of the general costs of running the network and therefore it would be recovered through access fees to wholesale customers such as Optus and Telstra and ultimately passed on to end users—in exactly the same way as the costs of NBN Co. deploying fibre into brownfield locations would be.[38]

4.40 The Implementation Study into the NBN was released subsequent to the committee's public consultation process. A key finding of the implementation study was that the 'fibre component of the NBN should be extended from 90 to 93 per cent and cover the 1.3 million new premises expected to be built by 2017–18.[39]

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35 Paul Budde Communication Pty Ltd, *Submission 14,* p. 1.

36 EM, p. 4.

37 Mr Daryl Quinlivan, Deputy Secretary, Department of Broadband, Communications and the Digital Economy, *Committee Hansard,* Sydney, 19 April 2010, p. 55.

38 Mr Andrew Sheridan, General Manager, Interconnect and Regulation, Optus, *Committee Hansard,* Sydney, 19 April 2010, pp 16–17.

39 McKinsey & Company and KPMG, *Implementation Study for the National Broadband Network*, 5 March 2010, p. 8, http://data.dbcde.gov.au/nbn/NBN-Implementation-Study-complete-report.pdf (accessed 10 May 2010).

4.41 Recommendation 13 of the Implementation Study is that NBN Co be the provider of last resort for premises within or adjacent to NBN's fibre access network and that developers be required to cover the costs of trenching and the duct, pit and pipe network and that NBN Co would be responsible for the cost of installing all other fibre infrastructure up to the network boundary.[40]

4.42 Recommendation 14 is that fibre design standards be developed that align with those being applied by NBN Co across its network. Recommendation 16 is that fibre networks that do not comply with the standards be overbuilt by NBN Co. Recommendation 17 is that all new developments where fixed line infrastructure is deployed be required to provide a duct, pit and pipe network to allow for later fibre deployment by NBN Co.[41]

4.43 If accepted by the government, these recommendations still leave open the possibility that other providers, besides NBN Co, will provide fibre facilities to new developments provided they meet the necessary standards. As such, the recommendations are not inconsistent with this Bill.

Committee view

4.44 The approach adopted in the Bill is that, if fixed-line infrastructure is installed in specified development projects, then that infrastructure must be fibre-related infrastructure. The committee believes this legislative approach is appropriate for the policy end sought. That is, the committee does not believe that it is necessary for the Bill to actually mandate that fixed-line infrastructure be installed in those specified developments. As the Department foreshadowed in its evidence to the committee, it is most likely that any such mandatory requirement will be supplied by state and/or local government planning policies.

4.45 The committee notes the concerns expressed regarding the potential for cross-border fragmentation of standards and planning requirements to arise due to the different requirements and obligations of different local government areas. The different standards could relate both to whether it is mandatory to install fixed-line telecommunications infrastructure in a new development in order to get planning approval, and also to the standards and specifications required for any installation work. However, the committee considers that concern about uniformity of standards and specifications is largely misplaced given the government's clear intention to establish national standards about technical matters and a national accreditation scheme for providers.

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40 McKinsey & Company and KPMG, *Implementation Study for the National Broadband Network*, 5 March 2010, p. 93.

41 McKinsey & Company and KPMG, *Implementation Study for the National Broadband Network*, 5 March 2010, pp 94, 95 and 97.

4.46 The committee believes there is significant scope for the government to continue to lead discussions between state and local government planning organisations to ensure that there is a nationally integrated and consistent set of requirements for the deployment of telecommunications infrastructure in new developments.

Recommendation 1

4.47 The committee recommends that the government continue its work with state and local government planning authorities to ensure a nationally integrated and consistent approach to requirements for telecommunications infrastructure in new developments.

4.48 As to the role of NBN Co, the committee notes that there is nothing in the explanatory material for the Bill or in the Position Paper that would preclude NBN Co from participating in new estates. However, the committee believes the government should make it clear in its response to the Implementation Study its expectations for the involvement of NBN Co in servicing new developments with fibre-related infrastructure.

Recommendation 2

4.49 The committee recommends that the government clarify, as soon as possible, the role of NBN Co in servicing new development projects.

Ownership, access arrangements, and integration with the NBN

4.50 The matters of who will own the fibre infrastructure once installed, how access to the infrastructure will be regulated, and how standards of service installation will be sufficiently regulated were all prominent concerns in written submissions to the committee.

4.51 A number of submitters merely noted that, in advance of sighting the proposed subordinate legislation, these were matters yet to be resolved.[42] Others were more descriptive of the topography of the issues.[43]

Ownership of infrastructure

4.52 The committee asked the Department to clarify who will own any fibre deployed to a project area (including backhaul), any fibre installed in it, and the fibre-ready infrastructure installed or constructed as part of the project. The Department responded that:

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42 For example, Engineers Australia, *Submission 11,* p. 3; Urban Development Institute of Australia, *Submission 15,* pp. 6–7; ENERGEX Ltd, *Submission 5,* p. 2; Ergon Energy, *Submission 8,* p. 2.

43 For example, Telstra Corporation Ltd, *Submission 9,* pp. 7–8; Optus, *Submission 7,* pp. 2–4; Housing Industry Australia, *Submission 3,* p. 3.

> A range of ownership and management arrangements already exist when it comes to the operation of telecommunications infrastructure in new developments. The government has not seen any reason why these arrangements cannot be left to the market. The government is concerned to ensure, however, that quality facilities are installed in new development and are operated to provide quality services. To a large extent this will be achieved through the setting of appropriate technical specifications and competitive forces. As a further safeguard, [the Department] is working with stakeholders on the development of a process for accrediting fibre providers and certifying the infrastructure they install.
>
> While legislation is not prescriptive as to who can own, manage or operate infrastructure in new developments, under section 47 of the *Telecommunications Act 1997,* a network unit (which would include fibre lines...) must not be used without the owner having a carrier licence or a nominated carrier declaration.[44]

4.53 While it may be the case that fibre cannot be owned by a person not holding a carrier licence or a nominated carrier declaration, the Department's answer does not necessarily address the uncertainty expressed by LandCorp as to ownership of all the fibre infrastructure and assets. LandCorp wrote to the committee that:

> As a condition of subdivision LandCorp is required to build the infrastructure (roads, power, water and drainage) to meet a prescribed set of specifications. The infrastructure within the estate would be build, inspected and certified as meeting the technical design specification and after testing, the infrastructure would be transferred to the appropriate body, with that subdivision infrastructure becoming part of that utilities network. It is presently unclear who LandCorp will transfer fibre infrastructure to once it has been constructed.[45]

Committee view

4.54 The committee believes there is a need for the Department to clarify with industry and future stakeholders who can own the relevant fibre-related infrastructure. It may be that allowing for a diversity of ownership arrangements provides scope for the development of innovative cost-sharing arrangements.

Recommendation 3

4.55 The committee recommends that the Department of Broadband, Communications and the Digital Economy give consideration to the variety of ownership arrangements that exist, or might arise, and whether there are good reasons for the government to intervene in these arrangements.

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44 Department of Broadband, Communications and the Digital Economy, answer to question on notice, Question 11, 19 April 2010 (received 28 April 2010).

45 LandCorp, *Submission 4,* p. 9.

Access arrangements

4.56 A number of submitters raised concerns about the lack of detail currently available as to the content of the regulations providing for access to fibre lines and fibre-ready infrastructure deployed in new estates. Optus and Telstra both submitted substantial comment on the importance of the matter to the committee.[46]

4.57 Proposed subsections 372CA(4) and 372CB(4) provide a high-level framework for regulations to establish a regime for third party access to a fixed-line facility.

4.58 The Position Paper provides little additional detail about the government's intentions for an access regime. It states:

> The government envisages that fibre networks in new developments will operate on an open access basis, and that wholesale services like those available on the NBN will be offered. There is scope for the Australian Competition and Consumer Commission (ACCC) under Part XIC of the *Trade Practices Act 1974* to declare access to services and regulate access pricing. The government will also consider more direct forms of regulation, if necessary, to ensure consistency of outcomes for service providers and end-users.[47]

4.59 In response to a question on notice raising the concerns of submitters, particularly carriers such as Telstra, as to the likely arrangements for an access regime, the Department stated:

> The regulations will provide all the appropriate guidance and will be developed with regard to existing and proposed telecommunications access arrangements and in consultation with stakeholders. The [EM] to the Bill notes that one possible model for the regulations is Part 5 of Schedule 1 to the *Telecommunications Act 1997* [the telecommunications access regime provisions].
>
> The Department recognises that the regulations will need to have due regard to carriers' obligations under Part 5 of Schedule 1 so as not to create conflicting obligations on carriers.[48]

Committee view

4.60 The committee acknowledges the critical importance of an effective and open access regime to fibre-related infrastructure for the provision of telecommunications services to the eventual end users in project areas.

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46 Optus, *Submission 7,* pp. 2–4; Telstra Corporation Ltd, *Submission 9,* pp 7–8.

47 Position Paper, p. 1.

48 Department of Broadband, Communications and the Digital Economy, answer to question on notice, Question 10, 19 April 2010 (received 28 April 2010).

4.61 The committee also notes the access arrangements in place under Part XIC of the *Trade Practices Act 1974* will apply to greenfield sites and the government has another Bill in the Senate, (the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009), to strengthen current arrangements. The committee urges the government to clarify its intentions in this regard. The committee notes the government's assurances that the-soon-to-be-released regulations will provide 'all the appropriate guidance' on the proposed telecommunications access arrangements.

Recommendation 4

4.62 The committee recommends that the government ensure that access arrangements, including the genuine equivalence of access of a kind contemplated for the NBN, operate in new developments consistently with those in the rest of the country.

Integration with the NBN

4.63 The chief concern of submitters regarding the integration of new fibre lines and fibre-related facilities with the broader NBN related to the clarity of network standards and specifications, and the extent to which further regulation and oversight of industry operators may be necessary.

4.64 Most submitters who addressed the matter were supportive of NBN Co having a clear role in setting industry standards.

4.65 The Urban Development Institute of Australia submitted that planning decisions will be hampered by there not being:

- a public document detailing NBN Co's deployment plans, that is, when they will be deploying to certain areas;
- a public document detailing NBN Co's technical design solution which will affect spatial planning requirements of a site to be 'fibre-ready';
- a publicly available NBN Implementation Study;[49] and
- an agreed industry standard on compliance thresholds.[50]

4.66 Mr Paul Budde expressed strong concern that, in the absence of clear guidance and co-ordinated policies, sub-standard work may otherwise be undertaken which will compromise the potential of the NBN:

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49 At the time of the committee's public hearings this document had not been publicly released by the government. It was subsequently released on 6 May 2010. It is available at: http://data.dbcde.gov.au/nbn/NBN-Implementation-Study-complete-report.pdf (accessed 6 May 2010).

50 Urban Development Institute of Australia, *Submission 15,* p. 5.

> This is a recipe for a patchwork outcome – different cabling topologies, different technologies, different construction standards, different services and service pricing, different ownership and operation models. Now that NBN Co is operational there is an obvious role for it to play in this; but, in the current documentation at least, there is no indication as to whether it is to play a role or what its role will be.[51]

4.67 Mr Budde recognised that there are a number of potential ways in which adequate supervision and installation practices may be regulated:

> NBN Co doesn't have to take over all of this work, it could also, of course, work very closely with existing bona fide greenfield operators and work out a plan with them. A positive industry policy could see these companies working together with NBN Co to achieve a truly national outcome, whereby the greenfield operators can concentrate on new innovative services.[52]

4.68 The Position Paper outlines an intention that 'networks in new developments be subject to clear technical specifications to maximise consistency with the end-use experience to be enjoyed on NBN Co's fibre network'. It also explains that the ministerial power to specify conditions for the deployment of fibre lines and the installation of fibre-ready facilities[53] enable the minister to set technical specifications and develop network standards.[54] The Position Paper explains that technical specifications to be applied in new developments would be contained in one or more of the following documents:

- A document published by NBN Co for this purpose;
- An industry code published by the Communications Alliance and registered by ACMA for this purpose; or
- Any industry standard that may be prepared by ACMA from time to time for this purpose.

4.69 The Position Paper also notes that Part 6 of the *Telecommunications Act 1997* provides a framework for the development of industry codes and standards and that proposed amendments to Part 6 contained in the Bill will 'make it simpler' to make relevant industry codes and standards for optical fibre facilities and services. The Department indicates in the Position Paper that it is currently working with the Communications Alliance on draft guidelines for the deployment of FTTP in new developments and has also consulted the Stakeholder Reference Group with early

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51 Mr Paul Budde, Paul Budde Communication Pty Ltd, *Submission 14,* p. 2.

52 Mr Paul Budde, Paul Budde Communication Pty Ltd, *Submission 14,* p. 2.

53 Proposed ss. 372B(4), 372C(4), 372CA(3) and 372CB(3).

54 Position Paper, p. 11.

drafts of this work. NBN Co has also been developing its own specifications and these have been provided to the Communications Alliance for consideration.[55]

4.70 Telstra was the only submitter to query the desirability of network standards being made as proposed by the Bill. Telstra argued that the categories for which the Communications Alliance and ACMA may make codes and standards are 'very broad and in particular would allow [the Communications Alliance] and ACMA to determine the characteristics and quality of services provided over Telstra and competitor business fibre networks.'[56] Telstra submitted this would be inappropriate because:

> Direct fibre for businesses is already a highly competitive and dynamic market. There is no case for Government intervention to prescribe specifications in this market, and the prospect of Ministerial proclamation could discourage investment and innovation in this already competitive market.[57]

Committee view

4.71 The committee believes that nationally consistent network standards and specifications are integral components to ensuring that fibre deployed, and fibre-ready facilities installed, in new developments, are properly designed and adapted to eventual integration with the NBN. The committee acknowledges the significant work and consultation process the Department is continuing to undertake with relevant stakeholders to ensure that appropriately adapted and targeted standards and specifications are developed.

4.72 The committee did not receive evidence indicating whether the network standards and specifications being developed will also deal with safety and training requirements for the deployment and/or installation of relevant infrastructure. To the extent that they do not, the committee believes that such matters ought to be specified as a condition of installation, and should be specified in an appropriate legislative instrument made by the minister pursuant to his or her power to specify conditions for the deployment of fibre lines and the installation of fibre-ready facilities.[58]

Recommendation 5

4.73 The committee recommends that the minister, by legislative instrument, specify that a condition[59] of installation of a line or fibre-ready facility in a project area is that the installation be undertaken in compliance with nationally consistent network safety and training standards.

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55 Position Paper, p. 11.

56 Telstra Corporation Ltd, *Submission 9,* p. 14.

57 Telstra Corporation Ltd, *Submission 9,* p. 14.

58 See proposed ss. 372B(4), 372C(4), 372CA(3) and 372CB(3).

59 Pursuant to subsections 372B(4), 372C(4), 372CA(3) and 372CB(3).

Recommendation 6

4.74 The committee recommends that the Bill be passed.

Senator Anne McEwen
Chair